

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

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**In the Matter of the Application of GOVERNMENT
EMPLOYEES INSURANCE COMPANY to stay
Arbitration,**

TRIAL/IAS PART 21

INDEX # 019059/10

Petitioner,

-against-

ARIF RASHID,

**DECISION AFTER
HEARING**

Respondent,

-and-

**GEICO INSURANCE COMPANY and CARMEN
VEGA-RIVERA,**

Additional Respondents.

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Pursuant to an order of this court (Adams, J., March 10, 2011) a framed issue hearing was directed to determine whether the automobile owned by additional respondent Carmen Vega-Rivera was involved in a hit and run accident. A hearing was held on June 7, 13, 17 and July 11, 2011. The court makes the following findings of fact and conclusions of law.

Respondent, Arif Rashid, testified that on April 8, 2010 at about 3:00 or 4:00 a.m. he was operating an off white 2004 Mitsubishi which was involved in an accident at the intersection of 21st Street and Astoria Boulevard in Queens, New York. Mr. Rashid had left the Queenborough

Bridge and was traveling on 21st Street where he stopped for a red traffic signal. When the light changed to green, he and the other motorist entered the intersection. A dark gray or blue minivan coming from Astoria Blvd did not stop for the light and entered the intersection. He testified that the minivan struck his automobile with significant force in the middle of the passenger side. The minivan then pulled out in reverse and fled the scene. Mr. Rashid was unable to give a description of the operator of the car that left the scene.

At some point after the accident, Mr. Rashid left his automobile and a witness who came to help him showed him a license plate that was embedded in the passenger door of his car. The license plate, which was in a black plastic holder, was handed to Mr. Rashid. The plate number was DGN-5995, New York. The police came to the scene and were shown the license plate, a police accident report was prepared, and the plate was returned to Mr. Rashid.

Police Officer John Tam testified that he has been a New York City Police Officer for five years. On April 8, 2010 he responded to the scene of an automobile accident at 21st Street and Astoria Boulevard. He prepared an accident report from the information given to him by Mr. Rashid and a witness listed on the report. He ran a license plate check and found that the vehicle assigned that plate on the date in question was a 2005 Honda Suburban owned by Carmen Rivera-Vega, 888 Grand Concourse Bronx, New York. A Honda Suburban vehicle can be a station wagon, minivan or SUV. The vehicle was not reported stolen at the time the officer prepared the report. Further, he testified that the owner of a vehicle missing a plate has a duty to file a police report and get new plates issued by the Department of Motor Vehicles.

In evidence was an abstract for a vehicle owned by Carmen Vega-Rivera printed on April 12, 2010 which showed that Ms. Vega-Rivera owned a blue 2005 Honda Suburban. There was a

voluntary plate surrender for DGN5995 on April 12, 2010 and new plates were placed on the vehicle that date. Government Employees Insurance Company (GEICO) insured this vehicle on the date in question.

Jaimie Rivera, the son of Ms. Rivera-Vega testified that on April 8, 2010 at 3:00 a.m. he was at the Club Amnesia located on Steinway Street in Queens. He arrived at the club at 1:15 a.m. and left at 4:15 a.m. He testified that he remained in the club for the entire three-hour period. He was driving his mother's 2005 Honda Odyssey on that date.

Mr. Rivera stated he left the club at 4:15 a.m., and the car was in the same spot in the mini-mall parking lot where he left. He testified that at that time he realized that his back license plate was missing, so he removed the bolts that were securing the front plate with pliers and attached it to the back of the automobile, drove home, and parked the car on 161st Street between Walton and the Grand Concourse.

Mr. Rivera testified that at no point on the way home did he drive through the intersection of 21st Street and Astoria Boulevard, and he was not in an accident on that date. He also testified that at no time was the plate ever attached to a black plastic holder, rather it was screwed directly to the bumper. However, Mr. Rivera conceded that he was aware that a 2005 Honda Odyssey came with a black license plate bracket. At some point he alleged that he removed the black bracket for "style" purposes. He also testified that he moved the plate to a position on the bottom of the car's grill and attached the front plate with "zip ties." Months later he reattached the front plate with bolts.

There is some damage to the left front of the Vega-Rivera automobile. Mr. Rivera testified that a truck or large SUV with a hitch backed into his mother's car in early April.

On Saturday, April 10th, 2011 Mr. Rivera told his mother about the missing plate. On that date Mrs Rivera-Vega went to the 44th Precinct. On April 12th Mrs. Rivera-Vega and her son went to the Department of Motor Vehicles to file for replacement plates.

Carmen Vega-Rivera testified that on April 8, 2010 she was the owner of a motor vehicle bearing license plate DGN-5995, insured by GEICO. Ms. Vega-Rivera testified that all of the windows of the Honda Odyssey came with factory tint. She also testified that she, personally, added tint to the side and back windows of the vehicle before April 8, 2010. Later, during cross examination, she stated that her son had the tint put on. Dr. Jonathan Charney, her treating physician, stated in a letter dated April 12, 2007 that Ms. Vega-Rivera's vision is sensitive to light, and in order for her to drive her vehicle, she requires the windows to be tinted. However, after that date, Ms. Vega-Rivera took the tint off the windows in order to have better visibility and continues to drive without the additional tinting. She testified that with the tint you could not see completely in or out of the side windows. Ms. Vega-Rivera testified that she was aware of the law regarding the use of additional tinting.

Ms. Vega-Rivera testified that on Saturday, April 12th, 2010, her son advised her that the back plate from her car was stolen and he put the front plate on the back of the automobile. At that time he told her that it happened early in the morning, Thursday April 8th, outside a club in Queens. She called the 44th precinct in the Bronx where she lives, and they said they would send a squad car. When the police did not arrive, she called again and was instructed to go to the

Department of Motor Vehicles on Monday. Since only one plate was missing, an officer advised her to go directly to the Department Motor Vehicles. On Monday she went to the Department of Motor Vehicles, surrendered the remaining plate, and was issued new plates.

Ms. Vega-Rivera testified that on April 8, 2010 the plates were not attached to a black plastic plate holder but were attached directly to the bumper. She testified that her front bumper did not clip onto the car correctly prior to April 8, 2010 and that there was also a linear vertical dent in the bumper caused by a truck which backed into the front of her car. In May 2010, she received a letter from GEICO with respect to the accident in question. She advised the insurance company representative that she had no knowledge of an accident. The GEICO representative asked her if she had a police report for the stolen plates. Since she did not have a report, on May 4th she went to the precinct and obtained one.

Ms. Vega-Rivera testified that she had surgery on March 11, 2010. Since the surgery, she left her house only one time to go out to eat with her son. It was at that time the truck backed into her car and caused the damage.

Mohammed Naveed testified that on April 8, 2010 he witnessed an accident some time between midnight and 2:00 a.m. at the intersection of 21st Street and Astoria Boulevard. He is a limousine driver and was returning to his car after eating dinner. The lighting conditions at this intersection were very good. He was about to cross Astoria Boulevard with the green light and observed a blue Honda Odyssey minivan cross through a red traffic signal and strike a beige, light-colored, off-white car. After the contact occurred, he rushed over to help. At the same time, the minivan backed up and fled the scene. Mr Naveed was about six or seven feet from the accident site when it occurred. At that time, Mr. Naveed testified that he saw the front and left

side of the face of the operator of the minivan that fled the scene. As the minivan fled the scene, he was able to see the operator of the minivan through the front driver's window. This window had light tinting, however, he was able to clearly see the operator of the minivan through that window. Mr. Naveed testified he was about two feet from the vehicle when he made his observation. He later added that the front passenger and driver's windows were not tinted. Rather, it was the rear passenger windows that were tinted. Further, as the minivan fled, Mr. Naveed observed that this vehicle was a Honda Odyssey. He also observed that a rear license plate was on the car, however, he was unable to read the plate numbers or letters, nor see if the front of the fleeing car was damaged.

Mr. Naveed observed the damage to Mr. Rashid's car and saw a license plate stuck to the car with the black frame was facing out. He removed the plate, which was attached to the frame, from the side of the car and handed it to the operator of the beige car. He recognized the license plate by the last three digits 995, as the one that was stuck to the car.

The police came to the scene of the accident. He spoke with the officer and told him what he had observed. Mr. Naveed testified that he does not know Mr. Rashid, never met him before the accident and has no interest in which party is successful in this litigation.

From the witness stand, Mr. Naveed identified Mr. Rivera as the operator of the 2005 Honda Odyssey. Mr. Rivera was in the courtroom, and Mr. Naveed pointed him out as the operator of the minivan that left the scene.

Bilal Talib is a licensed auto adjuster who is employed by GEICO. On July 8, 2011 he inspected the Vega-Rivera car. He found factory tinting on the driver's window. Additionally,

according to inspection records in evidence from May 15, 2010, the only front end damage was a "hitch" on the front bumper. The estimate to repair the Rashid vehicle was \$2,723.13 and the estimate to repair the Vega-Rivera vehicle was \$546.06.

Conclusions of Law

The license plate of the offending vehicle was left imbedded in the passenger door of respondent Arif Rashid's motor vehicle after it backed up and fled the scene of the accident. Mr Rashid described the fleeing vehicle as a dark gray or blue minivan. The plate was registered to a blue 2005 Honda Suburban owned by additional respondent Carmen Vega-Rivera. Mr. Rivera, the son of Ms. Vega-Rivera, claims that the license plate was stolen from his mother's vehicle that evening while he was at a club, and neither he nor the vehicle which he operated that evening was involved in the accident.

Vehicle and Traffic Law § 388(1) provides in sum or substance that every owner of a vehicle used or operated in this state shall be liable or responsible for death or injuries to a person or property resulting from the negligence in the use or operation of that vehicle by any person using or operating it with permission either express or implied of the owner (see *Panteleon v Amaya*, 85 AD3d 993). "There is a presumption that the operator was driving the vehicle with the owner's express or implied consent (see *Murdza v. Zimmerman*, 99 NY2d 375, 380, 786 N.E.2d 440, 756 N.Y.S.2d 505; *Tsadok v. Veneziano*, 65 AD3d at 1132.)" (*Panteleon v Amaya*, 85 AD3d 993.) "The strong presumption of permissive use afforded by Vehicle and Traffic Law § 388 can only be rebutted by substantial evidence sufficient to show that the driver

of the vehicle was not operating the vehicle with the owner's consent (*Matter of State Farm Mut. Auto. Ins. Co. v. Ellington*, 27 AD3d 567, 568; see *Matter of State Farm Fire & Cas. Co. v. Hayes*, 78 A.D.3d 1063"; *Fiduciary Insurance Co. Of America v Morris*, 84 AD3d 802.) Further, "[t]he uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her permission, does not, by itself, overcome the resumption of permissive use (*Talat v. Thompson*, 47 AD3d at 706, quoting *Matter of State Farm Mut. Auto. Ins. Co. v. Ellington*, 27 A.D.3d at 568" [other citation omitted], *Amex Assur. Co. v Kulka*, 67 AD3d 614, 888 N.Y.S.2d 577 [2nd Dept 2009].)

The facts in this case are somewhat different. There are sharp issues of credibility raised by the evidence. Additional respondents contend that someone took the plate off their vehicle and attached it to the front of another vehicle that subsequently was involved in this accident. The only evidence that the plate was stolen was the self-serving testimony of the additional respondents. The New York State Department of Motor Vehicles abstract indicates there was a "voluntary plate surrender" on April 12, 2010. The testimony reveals that no police report was actually obtained indicating the plate was stolen until after May 4, 2010 when Ms. Vega-Rivera spoke to a GEICO representative who advised her of the accident.

The court notes that the additional respondents testified that there was tinting added to the 2005 Honda prior to April 8, 2010. It was subsequently removed during the summer of 2010, even though Ms. Vega-Rivera testified that her vision is sensitive to light, and her physician stated that in order for her to drive an automobile the windows must be tinted. All

that is before the court are the self-serving statements of the additional respondent regarding when the tint was allegedly applied and removed from the windows of the Vega-Rivera car. However, no documentary evidence to substantiate this point was introduced other than the four-year old letter dated April 12, 2007 from Dr. Charney. Ms. Vega-Rivera was aware that there was a law regarding the amount of tint permitted on the front windshield and the front driver and passenger windows. She was also aware that her son drove the automobile with the additional tint. She testified that a police officer stopped her once and advised her to go to the Department of Motor Vehicles if she needed additional tint in order to drive. However, she never went to apply for an exemption. Further, upon inspection by GEICO on July 8, 2011, only factory tinting was found on this vehicle.

The court concludes that the contentions of additional respondents are without merit. The evidence does not rebut the strong presumption that the car involved in this accident was the 2005 Honda Odyssey owned by Carmen Vega-Rivera.

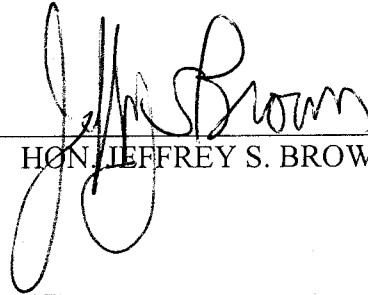
The non-party witness, Mohammed Naveed, places the blue Honda Odyssey minivan at the scene. He made an in court identification of Mr. Rivera as the operator of the offending vehicle that fled the scene. Mr. Naveed pointed out the imbedded license plate to Mr. Rashid, he then removed it and handed it to the respondent. Mr. Naveed also observed a license plate on the rear of the fleeing automobile. The license plate recovered at the scene was assigned to the blue Honda Odyssey on the date of the accident. This non-party witness had no interest in the outcome of the case. Additional respondents failed to rebut the strong presumption of permissive use.

For all the foregoing reasons, the petition to permanently stay the arbitration is granted.

This order shall stand as the judgment of the court.

Dated: Mineola, New York
September 28, 2011

ENTER :



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